Supreme Court, U.S.
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NO. 88-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY S. DOOLEY,
Petitioner,

v.

FORT WORTH INDEPENDENT
SCHOOL DISTRICT and
H. RICHARD O'NEAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief in Opposition To Petition For Certiorari

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No. 88-1687

In The

Supreme Court of the United States

October Term, 1988

Henry S. Dooley,
Petitioner,

v.

Fort Worth Independent
School District and
H. Richard O'Neal,
Respondents.

Petition for Writ of Certiorari To The
United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Petition for Certiorari

TO THE HONORABLE JUDGE OF SAID COURT:

The Respondents Fort Worth Independent School District and H. Richard O'Neal respectfully pray that the writ of certiorari be denied.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit, filed January 17, 1989, is unreported and is reprinted as Appendix D to the Petition for Writ of Certiorari at Pages 16a and 17a.

The opinion of the United States Court of Appeals for the Fifth Circuit On Motion for Rehearing filed February 13, 1989, is unreported, and is reprinted as Appendix B to the Petition for Writ of Certiorari at Page 13a.

The opinion of the District Court filed on December 9, 1987, is reported at 686 F. Supp. 1194 (N.D. Tex. 1987), and is reprinted as Appendix F to the Petition for Writ of Certiorari at Pages 20a through 36a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42 §1983.

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code Title 42 §2000e-2(a)(1)

> (a) Employer practices. It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred in holding that, on oral argument, this appeal was narrowed to the sole issue of whether Petitioner was denied due process where, after a disciplinary hearing that complied with due process, Petitioner was temporarily assigned to the transportation department rather than to another classroom.

II

Whether Petitioner was denied due process when, after a disciplinary hearing that complied with due process, Petitioner was temporarily assigned to the transportation department

pending the opening of a classroom assignment, where Petitioner was afforded the opportunity to contest or grieve such temporary assignment, where Petitioner's employment contract provided for assignment to positions other than teaching, where Petitioner was given a classroom assignment as soon as one was available.

III

Whether, even if it should be held that the Court of Appeals erred in holding that Petitioner's retaliation claim was no longer an issue on this appeal, the District Court's finding that there was no retaliation based on the correct legal standard.

IV

Whether, even if it should be held that the Court of Appeals erred in holding that Petitioner's jury claim was no longer an issue of this appeal, the District Court erred in refusing Petitioner's demand for a jury trial.

STATEMENT OF THE CASE

I

Coaching Assignment Termination

The Board of Trustees terminated Petitioner from his coaching assignment on February 28, 1984, after a due process hearing in which they found he had violently and without provocation tackled an eighth grade student. (Appendix M to Petition for Writ of Certiorari Exhibit C, p. 90a)

Petitioner had a hearing before an impartial panel and was represented by his attorney. The panel voted unanimously to recommend to the Board that Petitioner be relieved of his coaching assignment. After further hearing before the FWISD

Board of Trustees, the Board voted to terminate Petitioner's assignment as a coach upon findings that he used excessive and unreasonable force on a student. The Board directed the superintendent to remove Petitioner from the school where the tackling episode took place.

II

Temporary Assignment to Transportation Department

Pursuant to the Board of Trustee's order, Petitioner was removed from the school and was temporarily assigned to the transportation department pending an opening in a teaching field for which Petitioner was certified to teach. No such openings were available at this time. Petitioner was fully paid as a teacher during this temporary placement.

III

Teaching Termination

As soon as a teaching assignment was available, Petitioner was assigned to teach sixth grade science, a course in which he was certified to teach.

Petitioner's teaching was deficient in almost all respects, despite considerable assistance from school administrators. Accordingly, Petitioner was notified in writing of the school district's intent to terminate his employment as a teacher at the end of the school year. The notice set out ten reasons for termination and advised Petitioner of his right to a pretermination hearing before the Board of Trustees.

At the hearing Petitioner was afforded full due process including representation by his attorney, the right to cross-examine witnesses and to present evidence and argument. At the conclusion of the hearing the Board voted to terminate his employment as a teacher, and Petitioner filed suit.

While Petitioner initially raised various issues on this appeal, as stated in the per curium opinion of the Court of Appeals, Petitioner at oral argument narrowed his issues to one. Whether Petitioner was denied due process in connection with the temporary assignment to the transportation department. Accordingly, there is no issue on this appeal as to Petitioner's claim of retaliation or his claim of trial court abuse of discretion by the trial court in denying his demand for jury trial.

SUMMARY OF THE ARGUMENT

I

The Court of Appeals held that at oral argument this appeal was narrowed to the sole issue of Petitioner's due process claim respecting his temporary assignment to the transportation department. Notwithstanding such holding, Petitioner continues to urge retaliation and jury issues. Petitioner's brief does not suggest any basis for setting aside the Court of Appeal's finding as to the sole issue; he simply ignores the point altogether. Accordingly, we submit that there are no retaliation or jury issues to be considered by this Court.

II

The sole issue is whether Petitioner was denied due process when he was temporarily assigned to the transportation department pending the availability of a classroom teaching assignment.

Petitioner was reassigned for misconduct after a due process hearing. (Appendix D, p. 17a; Appendix F, pp. 23a-24a) The assignment to the transportation department was temporary, pending the availability of a classroom teaching assignment in a subject in which Petitioner was qualified to teach. (Appen-

dix F, p. 24a) Petitioner was afforded the opportunity to contest or grieve such temporary assignment. (Appendix F, p. 25a) Petitioner's employment provided for assignment to positions other than teaching. (Appendix D, p. 17a; Appendix F, pp. 24a-25a; Appendix M, Exhibit A, pp. 84a-85a) Petitioner was paid his full teacher's salary. (Appendix F, p. 24a) Petitioner was given a teaching assignment as soon as one was available. (Appendix F, p. 26a)

The District Court's findings in the above respects were based on undisputed evidence. Accordingly, it is clear that Petitioner was afforded due process meeting the Constitutional standards required by the Fourteenth Amendment. This assumes *arguendo*, without admitting, that Petitioner had a liberty or property interest in a specific *assignment*, as distinguished from his admitted property right in continued *employment*. Petitioner's position is groundless and frivolous. Certiorari should not be granted.

III

Petitioner claims that this reassignment was motivated by race discrimination and was retaliatory. Even if it should be held that the issue is in this appeal, it should be resolved against Petitioner. The District Court followed the familiar standards lain down in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 93 Sup.Ct. 1817, 37 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 Sup.Ct. 1089, 67 L.Ed.2d 207 (1981).

Respondent proved that the reason for Petitioner's reassignment was his misconduct in tackling an eighth grade child, and the reason for temporarily assigning him to the transportation department was that there were no openings for a classroom teaching assignment. Petitioner offered no evidence that

the reasons advanced by the school district were mere pretext to cover up retaliation and discrimination motives. The District Court found that Petitioner failed to establish his claim of retaliation and discrimination. The District Court followed the correct process of analysis, and its findings were based on undisputed evidence. Accordingly, the denial of Petitioner's retaliation and discrimination claims must be affirmed.

IV

The Petitioner claims that the District Court abused its discretion in refusing to grant him a jury trial. Even if it should be held that such issue is presented on this appeal, it should be resolved against Petitioner. It is barely mentioned in Petitioner's brief and is not supported by any argument or authority.

Petitioner's jury demand was untimely under Rule 38(b), Federal Rules of Civil Procedure. The Rule provides that failure to make a timely jury demand constitutes a waiver. Moreover, Petitioner's claims were equitable in nature. Petitioner was not entitled to a jury trial of equitable issues. Finally, Petitioner did not file a notice of appeal from the District Court's order denying jury trial. Accordingly, the District Court did not abuse in its discretion.

ARGUMENT

I

The holding of the Court of Appeals that the issue of Petitioner's due process claim is the sole issue on this appeal is not error.

The Court of Appeals held:

> [A]t oral argument this appeal was narrowed to the sole issue of whether plaintiff was denied due process when

> the Fort Worth Independent School District, after a disciplinary hearing that complied with due process, assigned him to the transportation department rather than to another classroom assignment. (Appendix D, p. 17a)

Petitioner's brief does not show any basis for setting aside such holding by the Court of Appeals. Accordingly, Respondent submits that the due process issue is the only issue properly submitted to this Court.

II

Petitioner's temporary assignment to the transportation department pending the availability of a classroom teaching assignment, following the school board's order for reassignment after a due process hearing in which Petitioner was convicted of violence on a child, was not a denial of due process.

Petitioner has conceded that he was afforded due process when he was terminated from coaching because he violently tackled a young child during football practice. The school board ordered that Petitioner be reassigned.

In light of the uncontroverted evidence at trial, the District Court found:

> Plaintiff was notified of his temporary assignment to the transportation department. Further, Plaintiff was provided the opportunity to contest or grieve his temporary assignment with the Superintendent of Schools. Plaintiff failed to request any further hearing or appeals after he and his representative discussed his reassignment with The Superintendent of Schools. (Memorandum opinion, Appendix F, p. 25a)

Petitioner appealed both the temporary assignment to transportation and his coaching assignment termination to the State Commissioner of Education. After a hearing wherein Petitioner was represented by counsel, the Commissioner found:

> 23. The Contract between the parties provides for reassignment of the teacher.
>
> 24. Petitioner was transferred, pursuant to the Board's order on March 8, 1984, to Respondent's transportation department. He had no teaching assignment and no student related responsibilities.
>
> 25. The Petitioner was transferred to the transportation department because there were no teaching vacancies available within the district when the transfer was ordered.
>
> 26. Petitioner transfer was temporary and was effective only until the end of the 1983-84 school year. (Memorandum Opinion, Appendix F, pp. 25a-26a)

While Petitioner had a Fourteenth Amendment property right to continued employment, unless terminated after being afforded due process, he did not have a liberty or property right in any particular assignment. His employment contract provided:

> It is understood and agreed by the parties to this agreement that the Superintendent of Schools shall have the right to assign such duties to the Teacher as the Board shall deem proper, and may, from time to time, assign or reassign the Teacher to duties other than or additional to those contemplated hereunder. (Appendix M, Exhibit A, pp. 84a-85a)

Both the District Court and the Court of Appeals held that Petitioner's contract provided for assignment to positions other than teaching. (Appendix D, p. 17a; Appendix F, pp. 24a-25a)

Petitioner was paid his full teacher's salary during the time of his assignment to the transportation department (Appendix F, p. 24a), and Petitioner was given a teaching assignment as soon as one was available. (Appendix F, p. 26a).

Petitioner's reliance on *Carter v. West Feliciana School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970) and *Lee v. Russell County Board of Education*, 563 F.2d 1159 (5th Cir. 1977) is misplaced. The "demotion" theory has been limited to reassignments incident to desegregation plans and has no application to the facts of this case.[1] *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985)

Petitioner was not entitled to due process as to his specific assignment, but even if he was, it was clearly afforded him.

III

The District Court's finding that Respondent was not guilty of retaliation or discrimination was based on the correct legal standard and is supported by undisputed evidence.

Petitioner argues that his discharge was retaliatory. It is well settled that, in order to prevail in a claim of retaliation, Petitioner has the ultimate burden of proof and must first demonstrate a prima facie case. To establish a prima facie case, the Petitioner must show:

---

[1]Petitioner misstates the record in arguing that his duties in the transportation department included "greasing and inspecting," "manual labor," or any professionally demeaning duties. There is no evidence to support such contention.

1) That his activities were statutorily protected;
2) That an adverse employment action was taken against him; and
3) There was a causal link between the protected activity and the adverse employment action.
(*Lindsey v. Mississippi Research and Development Center*, 652 F.2d 488, 491 (5th Cir. 1981), *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983)).

Even if Petitioner establishes a prima facie case, Respondent must only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Texas Department of Community Affairs v. Burdine*, 450 US 248, 254, 67 L.Ed.2d 207, 215 (1981).

Once Respondent has satisfied its burden by "explaining clearly the non-discriminatory reasons for its actions," the burden then shifts back to the Petitioner to prove that the reasons given by Respondent were merely a pretext for discrimination. *Burdine*, 450 U.S. at 256-257, 67 L.Ed.2d at 217-218.

The uncontroverted evidence demonstrates that Petitioner was terminated from his assignment as a coach for tackling an eighth grade child during football practice. Such an activity is not protected; therefore Petitioner has failed to establish even a prima facie case.

Even if it should be held that a prima facie case was established, it is undisputed that Respondent articulated legitimate, non-discriminatory reasons for terminating Petitioner's coaching assignment. Petitioner offered no evidence to show that the reasons given by Petitioner are "not its true reasons but were a pretext for a discrimination." *Burdine*, 450 U.S. at

254, 67 L.Ed.2d at 214, *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 804, 36 L.Ed.2d 679, 668 (1973).

Petitioner's retaliation complaint was investigated by both the EEOC and the Texas Commission on Human Rights. Both concluded that there was not "reasonable cause to believe the allegation is true." (Memorandum Opinion, Appendix F, p. 25a)

In summary, Petitioner failed to establish even a prima facie case of retaliation with respect either to Petitioner's removal from coaching or in the temporary assignment to the Transportation Department. However, even if a prima facie case were shown to exist, Respondent has articulated legitimate non-discriminatory reasons for Petitioner's transfer. The clear, uncontroverted testimony demonstrated that there were no teaching assignments available at the time of Petitioner's transfer.

As held by the District Court:

> Even assuming *arguendo* that Dooley has made out a prima facie case of disparate treatment, admittedly not an "onerous" burden, the School District has successfully met its burden of articulating a legitimate, non-discriminatory reason for Dooley's transfer to the Transportation Department. *Id.* at 253. Dooley was reassigned due to his misconduct in tackling an eighth grade student football player that failed to perform as desired by Dooley. Likewise, Dooley has failed to meet his burden of proving by a preponderance of the evidence that the reasons offered by the School District for his reassignment were false, or a mere pretext for discrimination. (Memorandum Opinion, Appendix F, p. 34a)

Petitioner's claim of retaliation and discrimination was properly addressed and correctly decided.

IV

The District Court's denial of jury trial was not an abuse of discretion.

On October 25, 1985, Petitioner filed his second of two complaints against respondent contending he was unlawfully terminated as a teacher and seeking reinstatement to his past positions.

On March 10, 1986, the Court signed an order setting the case for trial on April 13, 1987. Don Hill, attorney for plaintiff, filed his Appearance on June 6, 1986. However, it was not until March 5, 1987, one month prior to trial, that plaintiff filed a Motion for Leave to File Jury Demand.

Petitioner's demand for jury trial is untimely. (Rule 38(b) Federal Rules of Civil Procedure.) The last pleading directed to any issue triable to a jury, if any, was Respondent's answer filed on December 4, 1985. There was no request for jury trial in either of the two original complaints filed by Petitioner. As set out in Rule 38(d) FRCP, "failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) *constitutes a waiver by him of trial by jury.*" (emphasis added)

To wait fifteen months, then demand a jury trial one month prior to trial, is untimely and constitutes a waiver of trial by jury by Petitioner. *United States v. Unum, Inc.*, 658 F.2d 360, 303 (5th Cir. 1981); *United States v. Lochamy* 724 F.2d 494, 499 (5th Cir. 1984)

The Petitioner in his Motion for Leave to File Jury Demand and in his Brief in Support gave no justification for the lengthy delay; therefore there was no abuse of discretion on the part to the District Court in denying Petitioner's jury trial demand.

Rhodes v. Amarillo Hospital District, 654 F.2d 1148, 1154 (5th Cir. 1981)

Petitioner's amended complaint filed March 10, 1987 (one month prior to trial) raised no new issues and therefore should not allow a new opportunity to demand a jury trial. *Guajardo v. Estelle*, 580 F.2d 748, 752-753 (5th Cir. 1978). See also *McCorstin v. U.S. Department of Labor*, 630 F.2d 242, 244-245 (5th Cir. 1980)

Even if Petitioner had made a timely demand for a jury trial, he would not be entitled to a jury. Petitioner's central claim is that of the return of his job as a coach and teacher. His claims for reinstatement are equitable in nature. As such, Petitioner was not entitled to a jury trial. *Lynch v. Pan American World Airways, Inc.*, 475 F.2d (5th Cir.1973). "The imposition of monetary damages to make the employee whole for lost back-pay does not change the character of the proceedings and thereby mandate a jury trial." (citing *Harkness v. Sweeney Independent School District*, 427 F.2d 319 (5th Cir.1970) *Lynch* at 765).

There was no abuse of discretion exercised by the district court in denying Petitioner's demand for trial by jury.

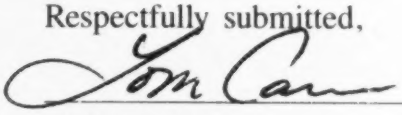
Furthermore, Petitioner did not file notice of appeal as to the order of the District Court denying the jury trial.

CONCLUSION

Petitioner was afforded full due process, and found guilty of tackling a student. Petitioner was removed from the school where the tackling event took place and was temporarily assigned to the transportation department, in that there were no teaching vacancies at that time. Petitioner's reassignment was pursuant to his employment contract. For the reasons set forth

herein, your Respondents respectfully submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,



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